IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943

International Harvester Company and International Harvester Company of America, *Appellants*,

v.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as Members and Constituting the Board of Department of Treasury, *Appellees*.

No. 355.

APPELLANTS' PETITION FOR RE-HEARING.

International Harvester Company and International Harvester Company of America, Appellants in the above appeal, hereby respectfully petition for a re-hearing.

As agreed to in the Stipulation of Facts (R. 24-25) we shall in this Petition, as in the briefs already filed, treat the International Harvester Company as the sole party plaintiff and appellant, and shall hereafter use the word "Appellant" in this Petition as covering both companies.

This Petition is restricted to the question of the tax on Class D sales.

Class D sales are sales by the branches of Appellant in Indiana, namely, the branches at Fort Wayne, Evansville and Terre Haute, which have territory outside Indiana, to dealers and consumers residing outside Indiana, who came to Indiana and took delivery of the goods themselves in Indiana, and then transported their goods to their homes in Kentucky, Ohio, and Illinois.

More than 94% of Class D sales were wholesale sales, namely sales by the branches to dealers. In 1935, the wholesale sales were $544,902.16. The retail sales in 1935 were $21,024.71. In 1936, the wholesale sales were $546,-892.24, and the retail sales were $33,182.06. (R. 45.)

We believe that the Court's opinion is based on the following three points:

1. Referring to the tax on Class D sales, the Court states in the last sentence of the opinion: "To deny Indiana this power would be to make local industry suffer a competitive disadvantage."

We are unable to conceive of a case where local industry would suffer a competitive disadvantage if the tax on Class D sales were held invalid, and we submit that no such case can be postulated.

2. On the question of multiple taxation, the Court says, "But it will be time to cross that bridge when we come to it."

We submit that this rule is directly contrary to the rule laid down by this Court in *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 and *Gwin, White & Prince, Inc. v.*

Henneford, 305 U. S. 434, where this Court held that unlawfulness of the burden did not depend on the contingency that a tax had already been levied on the same gross receipts by another jurisdiction.

3. The Court declares that the case is governed by the decision in *Department of Treasury, et al. v. Wood Preserving Corporation,* 313 U. S. 62, where this Court held that the Indiana Gross Income Tax could be applied to sales of railroad ties by the Wood Preserving Corporation to the Baltimore & Ohio Railroad Company.

To this we submit that the situation presented in the Wood Preserving Corporation case was exceptional and we do not believe that the rule of that case should be applied to Class D sales where it appeared that the seller and the buyers had been dealing with each other for years, and where the buyers who had contracts calling for shipment to them of the goods made their own delivery for the purpose of saving freight expense or expediting delivery or for both reasons.

We shall now take up these three points more at length—

1. The question of competitive disadvantage.

We have carefully considered the point of competitive disadvantage to local industry, in case the tax on Class D sales were held invalid, and we have been unable to see that local industry could suffer such a competitive disadvantage. We have tried to imagine a case where a local industry would be put at a competitive disadvantage if the International Harvester Company were relieved of the tax on Class D sales. We do not believe that such a competitive disadvantage can arise.

The Traffic World Map in evidence in this case shows that Evansville is the center of a wholesale trade area covering parts of Illinois, Kentucky and Indiana; that Fort Wayne is the center of a wholesale trade area which extends into Ohio counties along the Ohio-Indiana line; and that Terre Haute is the center of a trade area which includes parts of west central Indiana and east central Illinois (Plaintiff's Exhibit 2, R. 94). A similar showing is made by the map of "Wholesale Grocery Trading Areas," prepared by the United States Department of Commerce (Plaintiff's Exhibit 3, R. 95).

It is evident, therefore, that a local industry in Indiana selling to buyers in east central Illinois would be selling in the same general territory as that covered by the Appellant's Terre Haute branch. Likewise a local Indiana industry selling to buyers in southeastern Illinois and northwestern Kentucky, would be selling in the same general territory as that handled by Appellant's Evansville branch; and a local Indiana industry selling to Ohio buyers would be conducting its activities in the same general territory as Appellant's Fort Wayne branch. It might well be that local industries would have their selling offices located in Fort Wayne, Terre Haute, and Evansville, as in the case of the Appellant.

If, then, a local industry with a sales office in Terre Haute, for example, sold to a buyer in east central Illinois, the local industry would either ship the goods to the buyer by rail, or the buyer would come to Terre Haute and get the goods, as the buyers did in Class D. If the local industry in such case shipped the goods by rail to the buyer in Illinois, the sale would not be subject to the Indiana Gross

Income tax under the decision in the case of *J. D. Adams Mfg. Co. v. Storen,* 304 U. S. 307.

If, therefore, the Court should hold in this case that the sales in Class D are not subject to the Indiana Gross Income tax, then in case a local industry handled its sales to purchasers in Class D territory in the same manner as International Harvester Company handled them, the local industry would not be subject to the Indiana Gross Income tax on such sales.

We fail to see, therefore, how a local industry could be put at a competitive disadvantage if the tax on Class D sales were held invalid.

We do not believe that the Court means to say that a local industry would suffer a "competitive disadvantage" because it will pay a local tax if it makes an intrastate sale from an office in Illinois to a buyer in Illinois, or from an office in Ohio to a buyer in Ohio, or from an office in Kentucky to a buyer in Kentucky, whereas if the tax on Class D sales is held invalid, the International Harvester Company would pay no tax. By a parity of reasoning *any* exemption of an interstate transaction from a local tax because of the commerce clause would create a "competitive disadvantage" against an intrastate transaction. It is obviously not possible to obtain competitive equality between local tax burdens on intrastate sellers in different states. One state may have a 3% sales tax and another state no sales tax. The tax systems in the digerent states vary greatly, and we submit that it is impossible to obtain competitive equality between a local seller in Indiana and a local seller in Illinois or Kentucky or Ohio.

As a matter of fact, however, Kentucky has no sales tax, wholesale or retail. Moreover, the Illinois Retailers' Occupation Tax applies only to sales at retail, namely, sales to the consumer. (Smith-Hurd Ill. Stat., ch. 120, § 440.) Likewise, Ohio has no tax on wholesale sales. The Ohio sales tax applies to sales to the consumer only, and even the retail tax does not apply to sales of agricultural implements and machines. (General Code of Ohio, § 5546-1.)

We have already seen that 94% of the sales in Class D were wholesale sales.

Therefore the result of sustaining the tax on Class D sales will be to subject the Appellant to a tax on wholesale sales which a competitor would not pay on intrastate sales made in Ohio, Kentucky or Illinois, and, further, to subject the Appellant to a tax on retail sales which a competitor making a local sale in Kentucky would not pay, and a competitor making an intrastate sale of agricultural implements in Ohio would not pay.

We conclude that the fear of a competitive advantage to the Appellant is groundless.

2. The Question of Multiple Taxation.

We submit that the statement of the Court as to multiple taxation, that it will cross the bridge of multiple taxation when it comes to it, is directly contrary to the decision of the Court in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434. That case involved a tax by the State of Washington on gross receipts from the marketing of fruit which was shipped from the State of Washington to the places of sale in various states and foreign countries, and sold in those states and foreign countries by Gwin, White

& Prince, Inc. as the marketing agent for the fruit growers. This Court said on page 440:

> "Unlawfulness of the burden depends upon its nature measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden. . . ."

The same principle was declared in *J. D. Adams Mfg. Co. v. Storen,* 304 U. S. 307. The Court said on page 311:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids."

There was no showing in the *J. D. Adams* case that there had been a tax already laid by another state.

This Court in *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, declared that "The rationale of the Adams Manufacturing Co. case does not call for condemnation of the present tax" (p. 58).

In the dissenting opinion of Mr. Chief Justice Stone in *Northwest Airlines, Inc. v. State of Minnesota,* decided on the same day as the case at bar it is stated that Minnesota could not justify its

> "imposition of an undue proportion of the total tax burden which can be imposed on an interstate

> carrier by saying that other states have taken or may take less than their share of the tax. It is enough that the tax exposes petitioner to "the risk of a multiple burden to which local commerce is not exposed', *Adams Mfg. Co. v. Storen, supra,* 311; *Gwin, White & Prince, Inc. v. Henneford, supra,* 439, and cases cited."

Taxpayers naturally have relied on the definite statement by this Court in the *Adams* case and in *Gwin, White & Prince, Inc. v. Henneford, supra,* that it is not necessary for a taxpayer to show an *actual* multiple tax if the situation is such that the taxpayer is thrown wide open to the possibility of multiple taxation.

We think it fair to say that neither the Appellee nor the Appellant in this case has been dilatory and yet it has taken until 1943 to bring before this Court an appeal based on taxes for the years 1935 and 1936. We submit that the taxpayer should not be forced to wait four or five years more in order to present to this Court definite proof of multiple taxation when the Court has vigorously held in the *Adams* and *Gwin, White & Prince* cases that such proof was not necessary.

It is as certain as any question in taxation can be that such multiple taxation will be imposed.

We note that Mr. Justice Rutledge in his concurring opinion referring to Class D sales states that whether Illinois "could impose a use tax or some other as a property tax is not presented and need not be determined."

But the threat of multiple taxation on Class D sales is not merely the threat of a use tax by the state where the buyers live. 94% of Class D sales were wholesale

sales and the use tax is never applied to wholesale sales to the dealer but merely to retail sales to the consumer.

The threat of multiple taxation in Class D sales is the threat of a sales tax by the state of the buyer when the state of delivery of the goods has already imposed a sales tax.

We showed in our Appellant's Reply Brief that we have more here in Class D than a situation where the taxpayer is exposed to the threat of multiple taxation. We showed that the State of Illinois in the summer of 1943 amended the Illinois Retailers' Occupation tax to provide specifically that the tax would be applied on retail sales where a seller with an office outside of Illinois sends his salesmen into Illinois to solicit business and where the buyers come to the seller's place of business at the office outside of Illinois, obtain the goods themselves and bring them to their homes in Illinois. It is as certain as the operation of any tax law can be that Illinois will attempt to collect the tax on retail sales in Class D.

It may be argued that the Illinois tax could not be imposed on Class D retail sales because of this Court's decision in the case of *McLeod v. J. E. Dilworth Co.* (decided the same day as the case at bar), where it said that the J. E. Dilworth Company was "through selling in Tennessee" when it shipped the goods from Memphis to the buyers in Arkansas. The situation, however, has one difference, namely, that the International Harvester Company does have places of business in Illinois, Ohio and Kentucky and the J. E. Dilworth Company had no places of business in Arkansas. We do not believe that this difference should have any effect on the application

of a tax to Class D sales since Appellant's Illinois branches, for example, have absolutely nothing to do with the Illinois territory handled by the Terre Haute branch, or the Illinois territory handled by the Evansville branch, so far as Class D sales are concerned. But although there is no office of the Appellant in Illinois which in any way touches the business just as in the Dilworth Company case the Dilworth Company had no office in Arkansas which touched its business, it can hardly be doubted that state taxing authorities will contend that because Appellant has places of business in Illinois, Kentucky and Ohio, therefore Illinois, Kentucky and Ohio can tax Class D sales.

Since we are faced with an Illinois statute taxing retail sales to Class D buyers in Illinois and since there is a definite possibility of taxes on both wholesale and retail sales to Class D buyers by Illinois, Ohio and Kentucky, we submit that it is a matter of importance that this Court grant a rehearing on the question of Class D sales.

3. *The rule in the Wood Preserving Corporation case arose from an exceptional situation and should not be applied to Class D sales.*

Finally, we submit that the case of *Department of Treasury, et al. v. Wood Preserving Corporation*, 313 U. S. 62, on which the Court strongly relies in its opinion in this appeal, has striking and material differences from the situation in the case at bar.

The situation in the *Wood Preserving Corporation* case was exceptional, and the rule in that case should not be extended to a situation such as that presented in Class D. The Wood Preserving Corporation, the seller, had no place of business in Indiana. Representatives of the Railroad Company met with representatives of the seller in

Indiana, the ties were inspected, they were loaded on cars of the Railroad Company, and shipped to the treating plant of a subsidiary company of the Wood Preserving Corporation located at Finney, Ohio. But in the case at bar the record shows that the dealers and consumers both have had long relations with the Appellant. The dealers operated under annual contracts. The contracts provided for shipment by the Appellant to the buyers (R. 34A). The shipments would come either from the factory or branch house making the sale or one of the transfer houses of Appellant, none of which was located in Indiana. In the case of retail sales of motor trucks, the contracts provide for shipment to the buyer (R. 39). In the case of a retail order for general line goods, namely, farm implements and machinery, the contracts provide for the goods to be delivered to the buyer at the seller's place of business and that the buyer agrees to pay freight "on same from .... * * *." (R. 38.) There was strong evidence in the record of a saving in freight if the buyer came to the branch and got his own goods, or if the buyer went to the factory at Fort Wayne or Richmond and got his goods and took them home with him. (Exhibit 5, R. 97, and Exhibit 6, R. 99.)

In short, the buyer and the seller were dealing with each other across state lines and had been for many years, particularly in the case of dealers. The orders were transmitted across state lines, the acceptances were transmitted across state lines, and the normal course would be for the goods to be shipped across state lines or from points outside of Indiana. More than 80% of the sales made by the Class D branches were so completed (R. 45, 101-2).

If then, obviously to save freight or to get quicker delivery, the buyer (dealer or consumer) goes to the factory

or branch and takes the goods back, the transaction, we submit, should not be burdened with a tax in that case with which it would not be burdened if the goods are shipped by rail.

No such elements were present in the *Wood Preserving Corporation* case. There was nothing to show that there had been dealings between the Wood Preserving Corporation and the Baltimore & Ohio Railroad for years, and that the normal course was for the Wood Preserving Corporation to ship the ties itself to the Railroad Company.

This Court has frequently told taxpayers that they cannot convert a normal intrastate transaction into an interstate transaction by providing unusual terms or conditions.

We submit that since Class D sales are normal *interstate* transactions, this Court should not convert a normal interstate transaction into an *intrastate* transaction simply because the buyer to save expense and time makes his own delivery. This Court has frequently held in the cases we cited on page 25 of Appellants' Brief that where goods are purchased by a buyer in one state and transported by the buyer to another state, the transaction is one in interstate commerce. We see no reason why such a transaction should not be treated as interstate commerce for the purpose of taxation as well as for all other purposes. We submit, therefore, that the tax on Class D sales should not be sustained.

In its opinion in the instant case the Court refers with approval to its per curiam decision in *Allied Mills, Inc. v. Department of Treasury,* 318 U. S. 740, affirming the decision of the Indiana Supreme Court, 42 N. E. 2d 34,

which held that the buyer's state may tax an interstate sale. Yet in the case at bar the state of delivery, which is *not* the state of the buyer, is permitted to tax Class D sales. In *McLeod v. J. E. Dilworth Company*, this Court invalidated a tax by the state of the buyer. We are therefore still without a rule of general application to guide us. All we can say is that if the precise facts of a new case fit exactly the facts of a case on which this Court has ruled, the tax result in the new case is presumably known.

The difficulty of applying conflicting rulings that the state of the buyer may tax and that the state of delivery may tax is illustrated by the recent decision of the Supreme Court of California in *Standard Oil Company v. Johnson*, 147 P. 2d 577. in which it was held that the sale of oil physically delivered to California to the buyer (a railroad company) for transportation by the buyer to another state was not a sale made in California, because the railroad in transporting the oil was acting in its capacity as a common carrier. The California Court thereby avoided the unfairness of the arbitrary rule that the state of delivery may tax. Permitting a tax by the buyer's state on delivery to the buyer there, as in the New York City cases, has a basis of fairness in that the tax falls at the place of competition. But the bald rule that the state of delivery may tax is arbitrary and unfair and should be modified.

The Indiana gross income tax is still before this Court, in *Freeman v. Hewit*, No. 788, on appeal from the Indiana Supreme Court, 51 N. E. 2d 6, in which probable jurisdiction was noted on April 3, 1944, and in *Ford Motor Company v. Department of Treasury*, No. 958, in which certiorari was granted on May 29, 1944, to review a decision of the

Circuit Court of Appeals for the Seventh Circuit, 141 F. 2d 24. Both cases involve the question of the taxability of interstate sales. It is opportune therefore that the decision as to the Class D sales of International Harvester Company be reviewed and corrected.

We respectfully petition for a rehearing by this Court on the question of the taxation of Class D sales.

Respectfully submitted,

Edward R. Lewis,
Joseph J. Daniels,
Attorneys for Appellants.